



Signed and Filed: September 01, 2010

Dennis Montali

DENNIS MONTALI
U.S. Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF CALIFORNIA

In re) Bankruptcy Case
DOLPHIN REAL ESTATE NO. 1,) No. 09-30205DM
Debtor.) Chapter 7
JANINA M. ELDER, Trustee in) Adversary Proceeding
Bankruptcy,) No. 09-3176DM
Plaintiff,)
v.)
LAWRENCE E. PELZNER; HUGO DE HOYOS;)
FRANCES LOW; LAURA FLORES; MICHAEL)
CHALHOUB; PETER LOMMORI; FRANK)
VENTO; CHRISTINE STAHL; LARRY)
MUELLER; MIKE FOOR; RICO BAUTISTA;)
HIRMA GARABEDIAN;)
Defendants.)

MEMORANDUM DECISION ON MOTIONS FOR SUMMARY JUDGMENT

At the hearing on August 27, 2010, counsel for defendants argued that the principal theory on which he relies to support judgment for his clients is the idea that the Independent Contractor Agreement manifests an intent to create a lien that cannot be defeated by the trustee. He relies primarily on In re Pacific Far East Line, Inc., 654 F. 2d 664 (9th Cir. 1981)("PFEL"), which in turn drew upon Isrin v. Superior Court of Los Angeles County, 63 Cal. 2d 153 (1965).

1 While defendants' counsel had not abandoned alternative
2 theories of constructive or resulting trusts, the court commented
3 that those were not persuasive arguments, and took the matter
4 under advisement to review Isrin and PFEL, and also to permit the
5 parties to explore settlement.

6 The parties have advised the court that this matter will not
7 be settled. Accordingly, the court issues its ruling, denying
8 defendants' motion for summary judgment and granting the trustee's
9 counter-motion.

10 First, Isrin is not about liens, equitable, express or
11 otherwise. The court was confronted with the question of whether
12 an in forma pauperis plaintiff needed to advance jury fees when
13 her contingent fee attorney presumably was solvent and had the
14 economic means to advance those costs. In ruling for the
15 plaintiff, the California Supreme Court overturned a contrary
16 court of appeal decision (Gomez v. Superior Court (1933) 134 Cal.
17 App. 19), holding that "the right to proceed in forma pauperis in
18 appropriate cases may not be denied on the ground that counsel for
19 the indigent plaintiff is representing [her] pursuant to a
20 contingent fee contract." 63 Cal. 2d at 165.

21 Notwithstanding Isrin's specific and seemingly irrelevant (to
22 the matter before the court) holding, PFEL is binding and this
23 court must follow it if its holding applies.

24 In PFEL an attorney convinced the Ninth Circuit that his
25 prepetition legal work under a contingent fee contract,
26 representing 95% of the entire effort necessary to obtain a \$10
27 million cash settlement (along with other consideration), was
28 secured by a lien on the fund that had been created by his

1 efforts. The reasonable value of his prepetition services were
2 not questioned; rather the creditors committee wanted the claim
3 relegated to prepetition unsecured status.

4 Here the sequence of events is different, and defendants are
5 defending payments they received rather than seeking to be paid,
6 but the analysis is similar. Defendants' efforts took place
7 during the unsuccessful Chapter 11 case. The trustee wants to
8 recover post conversion (to Chapter 7) payments made to them; she
9 does not question the reasonableness of their claims or that if
10 surrendered to her, they would support unsecured Chapter 11
11 expenses of administration.

12 The PFEL court sustained the attorney's claim of a lien on
13 the fund, first noting that California does not recognize a common
14 law attorneys' charging lien. 654 F. 2d at 668 (internal
15 citations omitted). Rather, interpreting Isrin, the court
16 instructed that the intent of the parties determines the type of
17 claim an attorney may assert against a fund the attorney's efforts
18 created. Id., at 669. ("In essence, *Isrin* holds that if the
19 parties intend that the attorney look directly to the settlement
20 for payment, then a lien against that settlement is created in the
21 attorney's favor." Id.)

22 The court then referred to the district court's determination
23 that the attorney was entitled to look to the fund he had helped
24 create, and thus was entitled to an equitable lien. Such a
25 determination necessarily included a finding of requisite intent,
26 even without use of the term "lien." This finding was itself
27 supported by the evidence: the attorney had been hired, and the
28 first attorney terminated, because of the inability of the debtor

1 to pay fees "except from a fund generated by the litigation." Id.

2 This court is unwilling to extend this principle to the
3 situation before it, namely real estate agents' claims of lien on
4 funds received by their broker upon close of escrows handled
5 through the debtor's brokerage. First, PFEL is about a
6 contingent fee arrangement between an attorney and a financially
7 constrained client. Of course, Isrin's dictum is about an
8 indigent litigant's relationship with her contingent fee attorney.
9 There is nothing in either case suggesting that a lien will be
10 implied outside of the attorney-client relationship.

11 Looking to the Independent Contractor Agreement, there is no
12 expressed or implied grant of a lien. In fact, there is a
13 disclaimer of any relationship between the broker and the agent
14 except as an independent contractor. And there is nothing that
15 suggests or implies that the agent is to be treated specially
16 because of any financial limitations of the broker. While the
17 right to a real estate commission is certainly almost always
18 dependent (perhaps even contingent) upon escrow closing and the
19 commission being paid by the seller and shared among participating
20 brokers and their respective agents, that arrangement has nothing
21 in common with the contingent nature of the fee for the attorney
22 who gambles his or her efforts on a litigation matter in an
23 attempt to recover a percentage of the recovery. The two
24 businesses - contingent fee attorney and real estate broker - have
25 little in common and certainly not enough to extend the PFEL lien
26 approach as defendants argue.

27 Finally, the very language of the Independent Contractor
28 Agreement undermines defendants' theory. Paragraph 3(c) directs

1 the broker to transmit the agents' share of any commission, but
2 allows the broker, by incorporation of Paragraph 6, to deduct fees
3 and other charges otherwise owing by the agent. This is
4 inconsistent with any lien or trust theory of recovery.
5 Similarly, the final sentence of Paragraph 3(c) allows the broker
6 to pay referral fees or shared commissions from commissions
7 received by it. Plainly the relationship between the broker and
8 the agent is one of debtor-creditor.

9 The debtor received its commission revenue and deposited it
10 its general bank account. In the normal course of business it
11 then paid agents their share of earned commissions. Those shares,
12 from receipt of the commission until payment of the agent's share,
13 represented unsecured obligations of the debtor. This case is not
14 governed by the Ninth Circuit's PFEL decision, and is more like
15 the situation presented in Oxford Management, Inc. v. Chiasson, 4
16 F. 3d 1329 (5th Cir. 1993).

17 Accordingly, payments to defendants after conversion to
18 Chapter 7 were unauthorized transfers of estate property that can
19 be recovered by the plaintiff trustee under Bankruptcy Code § 549.
20 She is entitled to summary judgment in her favor. Counsel for
21 plaintiff should serve and upload an order denying defendants'
22 motion and granting her counter-motion, and a judgment against
23 defendants for each of their respective post conversion transfers
24 that are the subject of this action.

25 ***END OF MEMORANDUM DECISION***
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